

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TIMOTHY WEBB,)	
)	
Petitioner)	
)	
v.)	Civil No. 03-60-B-S
)	
SCOTT BURNHEIMER)	
)	
Respondent)	

***RECOMMENDED DECISION ON
PETITION FOR WRIT OF HABEAS CORPUS***

Petitioner Timothy F. Webb filed a 28 U.S.C. § 2254 petition on April 7, 2003, (Docket No. 1) and he has now filed an amended petition in response to my earlier order to do so. (See Docket No. 4). However, in both the original petition and the amended petition it appears to me that Webb challenges the legality of the sentence imposed upon him on August 12, 1988, by the Kennebec County Superior Court. As I understand Webb's circumstances, based upon his pleadings, they are as follows: (1) On Count I of Kennebec County Docket No. 87-490, Vehicular Manslaughter, he was sentenced on August 12, 1988, to ten years in prison, with all but eight years suspended, followed by two years of probation; (2) on the same date on Count V of the same indictment he was sentenced to ten years imprisonment, all of it suspended, to be served consecutively to Count I; and finally (3) on January 19, 2001, as the result of new criminal conduct, Webb was sentenced in Cumberland County Docket No. 00-1559 to four years imprisonment with all but nine months suspended and four more years of probation, to be served following the completion of his sentence in Kennebec County Docket No. 87– 490. Webb's petition does not challenge the Cumberland County sentence, indeed his original

petition noted that the judgment in that case was still under appeal. The three grounds he raises all challenge Count V of Kennebec County Docket No. 87-490 and are subject to summary dismissal under subsection (1) or (2) of 28 U.S.C. § 2244 (b). Accordingly I recommend that the court summarily **DISMISS** the present petition.

The Chronology of Events

Following the imposition of sentence on August 12, 1988, Webb commenced serving the sentence imposed on Count I.¹ After completing the initial eight years of imprisonment on November 6, 1992, Webb was released on the first probation under Count I. He violated that probation and was sentenced to serve the remaining two years on April 20, 1994. Webb was released to begin serving the second probation with a ten-year underlying sentence for Count V on July 17, 1995. On December 21, 1995, he was sentenced to four years imprisonment pursuant to a partial revocation of probation. He was released back to probation on April 17, 1998. On January 21, 1999, Webb's probation officer filed a motion to revoke probation, alleging that Webb's whereabouts were unknown. A second probation revocation motion was filed on October 31, 2000, alleging that Webb had been located on or about September 13, 2000, when he was arrested by the Maine Drug Enforcement Agency and charged with the new offense of possession of cocaine (the Cumberland County charge). On May 29, 2001, Webb admitted the violation and was sentenced to six years imprisonment, the remainder of the ten year sentence on Count V. The presiding justice noted that at the conclusion of the Count V sentence, Webb would then go into execution of the Cumberland County sentence imposed on January 19, 2001.

¹ The relevant dates regarding the probation revocations during the 1990's are obtained from a Memorandum prepared by Jeanne Blais, Classification Department of the Maine Correctional Center, and submitted by Webb with his memorandum in support of his original petition. (Docket No. 5.)

Webb's Federal Claims

I have not chronicled Webb's various state appeals and post-conviction proceedings, but I do note that through the years he has filed numerous actions in the state courts challenging his sentences on the Kennebec County case. Apparently he is presently engaged in the same process vis-à-vis the Cumberland County case. Most recently Webb attempted to challenge Count V's revocation process by means of a state post-conviction proceeding that was summarily dismissed on July 12, 2002,² because, according to the reviewing justice, probation revocation is not a matter for state post-conviction review and the petition was untimely in any event.

While incarcerated on the first probation revocation under Count V, on June 3, 1996, Webb filed an initial petition pursuant to 28 U.S.C. § 2254 with this court. Therein Webb asserted that his plea was coerced, that he was deprived of the effective assistance of counsel, that he was deprived of due process of law in the second revocation of his probation, that his consecutive sentences were unlawfully imposed, and that his sentence deprived him of equal protection of the laws in that he was not treated as were others similarly situated. Webb v. Warden, Me. Corr. Ctr., Civ. No. 96-174-P-C (D. Me. Jan. 28, 1997) (Cohen, Magis. J., recommended decision). This recommended decision was affirmed by a District Court judge on February 19, 1997, and the First Circuit Court of Appeals affirmed, in turn, on December 29, 1997.

The recommended decision squarely addressed the claim that Webb seeks to raise in this petition.

² The Superior Court order summarily dismissing the petition indicated that petitioner's probation was revoked and he was ordered to serve six years in May, 2002. I believe that this order means to reference the May 29, 2001, order of the Superior Court (Mills, J.) that terminated Webb's probation on Count V.

Contrary to the petitioner's claims, the sentences imposed in 1988 did not violate 17-A M.R.S.A. § 1256 or any precept of Maine common law. The sentence for manslaughter and the sentence for aggravated assault were imposed to run consecutively because, as the sentencing judge stated, the seriousness of the criminal conduct involved required consecutive sentences as permitted by section 1256(2)(D).

Id. at 8.

To the extent that Webb is now trying to challenge the legality of the sentence imposed in 1988, that claim must be dismissed by this court because the claim has already been presented in a prior application and is therefore barred under 28 U.S.C. § 2244(b)(1).

The one other possible identifiable ground that Webb attempts to raise in his petition appears to relate to the manner in which his sentence on the revocation was computed. According to Webb's theory, the fourteen months he served on probation should be subtracted from the period of imprisonment he has been sentenced to serve as a result of the probation revocation.

However, pursuant to Maine law, 17-A M.R.S.A. § 1206(7-A), the presiding justice was authorized to vacate all, part, or none of the suspension. She chose to vacate all of the remaining suspended sentence and require Webb to serve the entire six years. There is no statutory provision that requires the court to credit the time Webb served on probation against the suspended sentence. Nor do I know of any constitutional provision that would require such a result. Thus, to the extent Webb attempts to raise in this petition a new claim based upon predicate facts that arose during the May 29, 2001, probation revocation hearing, his claim is utterly without merit and should be summarily dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Proceedings.

Conclusion

Based upon the foregoing, I recommend that the court summarily **DISMISS** that portion of Webb's petition challenging the legality of the 1988 sentence as a second and subsequent petition under 28 U.S.C. § 2244. I further recommend that the remainder of the petition challenging the imposition of sentence at the May 29, 2001, probation revocation hearing be likewise dismissed because it does not state any claim upon which this court could grant relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: May 7, 2003.

Margaret J. Kravchuk

HABEAS, ADMIN

U.S. Magistrate Judge

**U.S. District Court
District of Maine (Bangor)**

CIVIL DOCKET FOR CASE #: 1:03-cv-00060-GZS
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WEBB v. BURNHEIMER

Assigned to: Judge GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.

KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 04/07/03

Jury Demand: None

Nature of Suit: 530 Habeas Corpus
(General)

Jurisdiction: Federal Question

Plaintiff

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PRO SE

V.

Defendant

SCOTT V BURNHEIMER